

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

TRANSCRIPT OF PROCEEDINGS

IN RE: ETHICON, INC., PELVIC REPAIR
SYSTEM PRODUCTS LIABILITY LITIGATION

MDL NO.
2:12-MD-2327

TELEPHONIC MOTIONS HEARING

August 5, 2014

**BEFORE THE HONORABLE CHERYL A. EIFERT
UNITED STATES MAGISTRATE JUDGE**

Court Reporter:

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produced by computer.

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1 P R O C E E D I N G S

2 THE CLERK: Good afternoon, everyone. This is
3 Laura calling from Judge Eifert's chambers. May I ask who
4 is on the line for plaintiffs' counsel, please.

5 MR. RICHARDS: Yes. This is Jason Richards. And
6 Renee Baggett is on the line as well. And I also believe
7 Andy Faes is on the line.

8 THE CLERK: Andy Faes? I'm sorry, I did not get
9 your last name. Could you repeat that, please.

10 MR. RICHARDS: My name is Jason Richards.

11 THE CLERK: Thank you.

12 MR. RICHARDS: Thank you.

13 THE CLERK: And for defense counsel?

14 MR. WATSON: For Ethicon this is Ben Watson. I
15 think I'll be the only one.

16 THE CLERK: All right. Thank you. And if you'll
17 hold one moment for the Judge.

18 (Pause)

19 THE COURT: Hello.

20 MR. RICHARDS: Hello, Your Honor.

21 MR. WATSON: Hello, Your Honor. Good afternoon.

22 THE COURT: All right. I understand we have
23 Richards, Baggett -- and who is the last person for the
24 plaintiff?

25 MR. FAES: Andy Faes, Your Honor.

1 THE COURT: Faes, okay. Thank you. And then Ben
2 Watson for the defendant?

3 MR. WATSON: Yes, Your Honor.

4 THE COURT: All right. Before I get started on
5 the motion, let me say that I spoke with Kate and Judge
6 Goodwin this afternoon about the designations, the
7 deposition designations and the hearing on August 14. They
8 want me to talk to you a little bit about what's been filed.

9 And I went back and I looked at the order, and I see
10 that you were supposed to file everything. And then this
11 week you're supposed to be meeting and talking about how
12 you're going to pare down what you've filed so that when we
13 have the hearing on August 14 you're going to have
14 significantly pared down what your arguments are over.

15 You all understand that; right?

16 MR. FAES: This is Andy Faes, Your Honor. We do
17 understand that and we've been working with the defense team
18 on, on the deposition designations and paring those down.

19 THE COURT: Great, because what --

20 MR. WATSON: Yes, Your Honor. My understanding is
21 we've been having serious negotiations and they'll continue
22 this week.

23 THE COURT: What Judge Goodwin has suggested and
24 what I'm going to do, the advice I'm going to take is, is --
25 the way I'm going to handle that hearing is have you come on

1 August 14 and bring with you just what it is you want me to
2 rule on -- I'm not going to look at anything that you filed
3 ahead of time -- have you come with exactly what's left and
4 we'll go through them that day and rule on them that day.
5 And if we don't get done that day, I'll just have you spend
6 the night and come back the next day. But he has suggested
7 that I rule on them just as I would at trial.

8 So, I'm not going to be looking at boxes and boxes of
9 documents. So, I just want you to be aware of that. So, I
10 suggest you try to work out as much as you can.

11 As he said to me, and I agree, you're all experienced
12 lawyers. You're all very familiar with the rules of
13 evidence. So, you really shouldn't need much help from me.
14 I would expect that you could do most of that yourself. I'm
15 happy to help you, but I'm, I don't think it would be
16 necessary for me to read what you've filed at this point.
17 I'll just wait and see what you have on August 14.

18 Does that sound fair?

19 MR. WATSON: Yes, Your Honor.

20 THE COURT: Great. Now, that brings us to this
21 motion. And I had -- I looked through the motion and I
22 looked through the briefing. And, of course, it's pretty
23 old. The briefs are old.

24 But what, what struck me, and one of the things I did
25 talk to Kate and Judge Goodwin about -- because I haven't

1 really been up on the *Huskey* case since I really haven't
2 done anything in the *Huskey* case. And that's the one that's
3 coming up for trial. I noticed that all of these requests
4 for admissions had to do with the FDA's 510(k) process. I
5 knew that Judge Goodwin had ruled on that in a couple of the
6 cases that had gone to trial, but I wasn't sure what had
7 happened in *Huskey*.

8 So, when I was speaking with him and Kate, I asked him
9 about that and he told me that he had already ruled on that
10 in *Huskey*. And Kate sent me a copy of the order.

11 So, I'm a bit confused as to why Ethicon wants this
12 motion heard since he has already ruled that all evidence
13 pertaining to the 510(k) process is excluded.

14 MR. WATSON: Yes, Your Honor. This is Ben Watson
15 for Ethicon. Hopefully I can answer that question.

16 First of all, you know, we understand Judge Goodwin's
17 ruling and we certainly respect it. But we also reserve our
18 right, you know, during *Huskey* and in later trials as the
19 evidence progresses to be able to continue to argue that.
20 And perhaps, you know, at some point, you know, the decision
21 on that may change.

22 But, more importantly, and specific to *Huskey*, it's my
23 understanding that we want to offer a proffer of this
24 information. Assuming Judge Goodwin keeps his ruling the
25 same, we still want to proffer this information and these

1 documents on the 510(k) process to reserve that for
2 appellate purposes.

3 And, of course, you know, having the documents
4 authenticated and the requests for admissions, you know,
5 properly answered certainly streamlines that proffer
6 process. So, I, I understand the Court's concern, but
7 that's why, you know, we feel like we need to go forward on
8 this.

9 THE COURT: Have you talked to Judge Goodwin about
10 making a proffer?

11 MR. WATSON: Your Honor, I'm not sure. I'm not
12 sure whether there have been any discussions with, with
13 Judge Goodwin. That's my understanding of the intent. But
14 whether they've involved him in that, I'm not sure.

15 THE COURT: Let me ask the plaintiffs because I --
16 you know, I don't want to spend a lot of unnecessary time on
17 a motion that may be un- -- especially at this point in time
18 that really may be unnecessary. I don't know -- I, I think
19 that Judge Goodwin has looked at this issue several times
20 and I don't, I don't feel he's going to change his mind on
21 whether this type of information is admissible at trial.

22 So, that would leave whether or not you would make a
23 proffer. I don't think he's going to want you to -- I mean,
24 I don't know what he would want to do as far as the timing
25 of the proffer, whether he would just let you make it -- I

1 don't know why he would want you to make it during the trial
2 because -- how many days is he giving you?

3 MR. WATSON: It's not long, Your Honor. I believe
4 it's less than two weeks.

5 THE COURT: I think just from -- I'm thinking just
6 from a practical standpoint, have you and the plaintiffs
7 had -- have you and the plaintiff had any discussion about
8 how that might be accomplished? Would the plaintiff be
9 willing to stipulate to any of these documents for purposes
10 of a proffer?

11 MR. WATSON: We have not had that discussion, Your
12 Honor, but I think if we did, if they were willing to, you
13 know, certainly stipulate to the authenticity of these
14 documents, that may go a long way in helping us not to have
15 to go through all of these.

16 MR. RICHARDS: Your Honor, this is Jason Richards
17 for the plaintiffs. And I guess that's our concern too
18 which is -- in PTO 4 the Court said, you know, try to find
19 some creative ways to, to streamline the process as far as
20 discovery goes and, and make it more efficient.

21 And typically what is done every day in the courts is
22 you exchange exhibit lists and you try to agree on which
23 documents you're not going to have any dispute about the
24 authenticity over. And if you have a dispute, you take it
25 to the Court. But usually you just exchange exhibit lists

1 and you stipulate that certain documents are authentic and
2 that's the way it's done every day.

3 THE COURT: Uh-huh.

4 MR. RICHARDS: So, trying to submit -- trying to
5 accomplish the same thing through requests for admissions by
6 every plaintiff, and we have no idea whether the FDA
7 approved MDA 4278 in 1970, seems the wrong way to go about
8 it.

9 THE COURT: No, you know, I'll tell you what. I,
10 I didn't like this either. I did not like doing this
11 through requests for admissions. And I'll tell you, I'll
12 tell you the problem that I had with it.

13 I've never seen it -- in, in all of the years that I've
14 practiced, I've never seen it done this way. And, and I
15 couldn't at first put my finger on why it bothered me. I've
16 always -- I've seen, of course, requests for admissions
17 having someone admit the genuineness of documents. But
18 usually it's done where you're asking someone to admit that
19 their own documents are genuine or you have somebody admit
20 that documents from a third party are genuine.

21 For example, where you've gotten somebody's medical
22 records and you've gone to the custodian of the records and
23 you've, you've gotten those records and you submit those
24 with the certification from the custodian and everybody
25 agrees, yes, they admit those are true and authentic copies

1 of the records. I've never seen somebody say to the other
2 side, "I want you to admit that my records are genuine."

3 And I think what bothered me about it is that it, it's
4 sort of a way to circumvent what the rules of evidence
5 require you to do. When you're submitting a piece of
6 evidence, you're required as the proponent of that piece of
7 evidence to authenticate it. So, what you're doing is
8 you're trying to circumvent your responsibility to
9 authenticate your piece of evidence by asking someone to
10 admit that it's, that it's true and authentic.

11 And I think that's what kind of bothers me about it
12 because it's sort of a way to kind of, to escape the burden
13 that you would normally have under the rules of evidence.
14 And I, and I don't think the plaintiffs would really have
15 any way of, of being able to truthfully say that's genuine.

16 How do they know? How would they really know that
17 you've given them the entire letter? You attach a letter
18 and say, "Admit that this is a true copy of a letter that I
19 wrote." I don't know how they could, how they could
20 possibly say that. I think -- you know, I, I did not like
21 them either. I could understand why they would have a
22 problem with that.

23 And I would especially understand why they would have a
24 problem with that in the circumstances of an MDL where
25 you've got thousands of plaintiffs that the steering

1 committee doesn't really represent. You've got all of these
2 lawyers, individual lawyers representing these individual
3 women and you're asking this small group of, of responsible
4 supervising plaintiffs' lawyers to make admissions on behalf
5 of all these people.

6 And who knows what's going to happen to these cases.
7 They may all get remanded. I mean, we don't know really
8 what's going to happen.

9 So, you know, I, I was -- I didn't, I didn't like this
10 either. I didn't like the way that it, that you were going
11 about it. I felt there were other ways that this could be
12 done.

13 Now, you know, I would have, I would have thought it
14 was less troublesome had you authenticated them and then
15 attached them. Like, for example, if you, if you did what
16 the rule required -- if you go to Rule 902, for example, and
17 you had attached the certificate that Rule 902 requires, the
18 custodian certificate from the corporation, and, you know,
19 that certificate has to be compliant with Rule 803 and it
20 says, "I am the, I am the custodian of the documents, of
21 Ethicon's documents and I hereby certify that these are true
22 and accurate copies of documents kept in the ordinary course
23 of business," and blah, blah, blah, blah, blah, and you have
24 that certificate attached to each one of these letters and
25 then said, "Admit that these are true and accurate copies,"

1 even that would be better than, you know, the way it was
2 done here.

3 But I don't even know why you'd have to do that. I
4 mean, if you, you know, if you can authenticate them, then
5 why are you asking for the plaintiff to agree that they're
6 authentic? I guess all you're doing is you're finding a way
7 not to have to bring your custodian to trial. But I don't
8 know why you couldn't just stipulate for the purposes of
9 each case that these are authentic records. It didn't even
10 sound like you tried to do that yet.

11 MR. WATSON: Yes, Your Honor. This is Ben Watson,
12 if I could quickly respond.

13 I mean, we're certainly agreeable to the, to the
14 stipulation route. I think that makes a lot of sense. And
15 we're certainly willing to sit down with the plaintiffs and,
16 and see if we could get that worked out.

17 But to address Your Honor's concerns about the RFAs
18 themselves, I mean, that's why we, why we proceeded this
19 way. You know, our hope is when you've got this number of
20 documents to deal with, you know, that we could obviate the
21 need at trial to, as you say, bring in a records custodian,
22 have them testify, "Yes, it's a true and correct copy."

23 Most of these documents are, of course, documents,
24 regulatory documents we have received from the, from the
25 FDA. And we thought it would be a simple process to say,

1 you know, "Do you agree or not agree, you know, that this is
2 a true and correct copy," you know. "Those that you don't
3 agree, let's find that out so we can solve those problems
4 either before or, or during trial."

5 So, that's why we submitted our RFAs. You know, as
6 Your Honor mentioned, several use RFAs in the context of
7 authentication of third party documents such as medical
8 records. And I think that the FDA documents would be akin
9 to that.

10 The other party, you know, certainly doesn't know
11 exactly what the third party has. But if the other party
12 has gone and gotten them and said, "Look, this is, this is
13 what we have gotten from the third party," we think that's a
14 reasonable basis for an RFA.

15 And in addition, you know, most, if not all, of these
16 documents are responsive to their document requests or
17 they're documents that we're being asked to produce from our
18 files that we are, that we are producing to them.

19 And in terms of, you know, the steering committee
20 finding all the plaintiffs, well, you know, in fairness I
21 think that goes to any RFA. And it certainly is part of the
22 MDL process, you know, that -- you know, that's just a part
23 of what, what has to happen.

24 But I understand Your Honor's concerns and it, it makes
25 sense. You know, we would certainly be willing to sit down

1 with the plaintiffs and discuss -- you know, maybe we can
2 come up with a stipulation. You know, frankly, I'm not sure
3 that stipulating that the document is authentic versus
4 admitting it is much different, but we're certainly willing
5 to, to go down that road.

6 And hopefully, as Jason said, we've worked well
7 together in the past and we certainly are mindful of Judge
8 Goodwin's admonition that we find creative ways to try to
9 shorten the discovery process and eliminate any unnecessary
10 disputes. So, we're certainly willing to do that.

11 THE COURT: I think when you're talking about --
12 that's, that's always the problem with requests for
13 admissions because they're really not technically discovery.

14 MR. WATSON: Right.

15 THE COURT: And, you know, I think when you look
16 at Rule 36 it talks about how you serve these requests just
17 for the purposes of the pending action only. And they're
18 more of a way to narrow issues when you've got a case that,
19 you know, is coming up for trial.

20 The problem with the MDL is that there's just -- it's
21 so big that you -- and there are so many documents that I, I
22 would -- I can see why they feel uncomfortable when you're
23 talking about trying to just accept, you know, all of these
24 documents -- some of them are so old too -- just sort of
25 wholesale and not actually having anybody verify that these

1 are, you know -- there's no, there's no custodian who's
2 ever, from Ethicon that I know of who's ever sat down and
3 verified that these are actually true and accurate copies of
4 what you have.

5 And, you know, you've had the spoliation motion hanging
6 over your head. So, I could see why the plaintiffs might be
7 a little hesitant to just say, "Oh, yeah, I'm sure whatever
8 you've given us is a true and accurate copy."

9 Do you see what I'm saying?

10 MR. WATSON: Yes, Your Honor.

11 THE COURT: That's why I think maybe -- I could
12 understand their reluctance to do that. I think probably --
13 I understand, I understand the point you're trying to do, or
14 what you're trying to do, Mr. Watson. And I understand
15 you're just trying to streamline this so you don't have to
16 do a lot of unnecessary things like log in a custodian and
17 have someone just sit there and go through the, the
18 horrible, burdensome, onerous, boring process of going
19 through letter by letter and saying, you know, "These are --
20 this is a true and accurate copy of this letter on this
21 date."

22 And hopefully the plaintiffs would never make you do
23 that. I, I think probably Judge Goodwin would, would just
24 kill somebody if he had to sit there and, and listen to
25 that. And I don't think anybody would want to do that.

1 I'm sure there must be some way you can stipulate to a
2 lot of these letters. Now, I don't know what you're going
3 to do about the FDA letters, whether you'll have to --
4 whether the plaintiffs would be willing to stipulate to the
5 FDA's letters or not. I would, I would --

6 MR. RICHARDS: Your Honor, I can maybe answer that
7 a little bit which is what we did in the old days in the
8 Fen-Phen litigation was basically the defendant requests
9 what's called a red ribbon version of an FDA document. And
10 it's a governmental document, so it comes in subject to the
11 Court allowing it to come in, which I guess is in question
12 here. But it's basically a document from the FDA and it
13 literally has a red ribbon on it. So, that way you know
14 it's an official FDA document.

15 So, that's one way to streamline the FDA document
16 process. I don't know if the defendant has gone about
17 requesting those red ribbon copies from the FDA or not, but
18 that's certainly one way to streamline the FDA documents.

19 MR. WATSON: Your Honor, I'm not sure if we have
20 requested that from the FDA or these, they come from our
21 regulatory files, but I can certainly look into that.

22 MR. RICHARDS: But, again, I guess I don't know if
23 it's coming in based on Judge Goodwin's rulings, but, you
24 know, I'm just throwing that out there as one way to skin
25 that cat.

1 THE COURT: Right. Yeah, I think -- I mean, under
2 Rule 901 and 902 it wouldn't be hard to authenticate these
3 documents. And once you've authenticated them, they would
4 be admissible as exceptions to the hearsay rule. The only
5 question is are they admissible as being relevant or not.

6 Clearly, Judge Goodwin has already ruled that they're
7 not relevant. I mean -- well, he's ruled that they're not
8 admissible because they're misleading and confusing, not
9 necessarily that they're irrelevant per se. But he's
10 already ruled they're not admissible in this particular
11 case.

12 But you could -- you can certainly authenticate them
13 fairly easily. There's other ways to do it, I think, that
14 make more sense to me and would be less troublesome than
15 going about it through requests for admissions that are
16 going to apply to every plaintiff in this MDL. And I think,
17 you know, that would be my, my preference.

18 I, I'm not comfortable with these requests for
19 admissions. I, I have the same kind of problems with them
20 that the plaintiffs do.

21 MR. WATSON: Yes, Your Honor, we understand that.
22 Perhaps Jason and I can get together in the coming days and
23 figure out a way to hopefully work through this and get some
24 stipulations down.

25 THE COURT: Yes. I think what I'm going to, what

1 I'm going to do with your motion is I'm going to deny it --
2 I'll deny it without prejudice to you reasserting it because
3 there may be a situation where it would require a closer
4 look. Maybe there would be some reason.

5 For example, say you go to the FDA and there's some old
6 letter that they no longer have and then we'd have to look
7 closely at a letter that you've attached here. And maybe
8 the only way to actually authenticate it would be through a
9 request for admission. And then I wouldn't want to have
10 foreclosed that possibility. But I'm -- I think -- I'm
11 thinking that requests for admissions is not the first route
12 to go.

13 MR. WATSON: We understand, Your Honor. We'll get
14 that process going and hopefully we can come to an agreement
15 and not have to reurge anything.

16 THE COURT: All right. The second thing I would
17 suggest too is if you're serious about making a proffer to
18 Judge Goodwin, I would ask him how he would like you to do
19 that. And maybe you and the plaintiffs, the plaintiff in
20 this case, plaintiffs can figure out how to do that.

21 He might want you to do that before the trial begins or
22 during jury deliberations or something so that it's not, you
23 know, disruptive while you're trying to put your case on.
24 Maybe you can find some way to do that.

25 And I think that would be better for you as well so

1 that you're not trying -- you're not diverted while you're
2 trying to put your case on trying to do, you know, a proffer
3 because I know you guys are going to be really busy. You're
4 not going to have a lot of time, and you want to be focused
5 on what you can actually present to the jury. I would ask
6 him now in advance while you have a little bit of time to
7 think about it.

8 MR. WATSON: Absolutely. We will do that so that
9 he knows it's coming and we can figure out the best way and
10 best time to do it.

11 THE COURT: Let me ask you, because I think you
12 all would know this better than me -- now, this, this -- the
13 issue first came up in the *Bard* case. Is that right?

14 MR. WATSON: I believe that's right, Your Honor.
15 Then it came up in the *Lewis* case.

16 THE COURT: And in the *Bard* case wasn't that,
17 wasn't that issue -- didn't they appeal that issue?

18 MR. WATSON: I honestly don't know the answer to
19 that, Your Honor.

20 THE COURT: Okay. For some reason I was thinking
21 maybe that was an issue that had been appealed, but I hadn't
22 heard any more about it so I didn't know whether that, there
23 had been any, anything further on that. I guess I'll have
24 to look, look and see what's going on with that because that
25 would --

1 I'm sorry. Go ahead, Ms. Baggett.

2 MR. RICHARDS: Yeah, I'm sorry. This is Jason
3 Richards, Your Honor.

4 THE COURT: Okay.

5 MR. RICHARDS: We're not exactly positive either.
6 Ms. Baggett -- Renee says that they did a motion for
7 clarification, but she doesn't recall specifically whether
8 it was appealed or not.

9 THE COURT: Okay. I didn't know if there had been
10 anything done on that that might make a difference in your
11 proffer on -- in your issue of proffering.

12 Well, I'm not going to do a very long order on this.
13 I'm just going to put in the order that at this point, I'm
14 going to deny it without prejudice. I'm going to -- and I,
15 I've instructed the parties to pursue other routes to
16 authenticate these documents such as by stipulation.

17 MR. WATSON: Yes, Your Honor.

18 MR. RICHARDS: Yes, Your Honor. Thank you.

19 MR. WATSON: We appreciate your time.

20 THE COURT: Thank you.

21 MR. WATSON: Your Honor, I actually have a quick
22 issue to bring up if now is the appropriate time.

23 THE COURT: Certainly.

24 MR. WATSON: We have a dep- -- there's a
25 deposition coming up August 20th. And I am just the

1 messenger here. I don't know many of the details. But
2 Rhonda Peoples (phonetic) is the witness. In her previous
3 deposition we had run into some issues. I won't get into
4 those. But we have agreed to continue the deposition on
5 August 20th.

6 In case we do run into any disputes that the parties
7 can't resolve themselves, we were just going to check to see
8 if Your Honor is available that day in case we do need to
9 make a call.

10 THE COURT: What day of the week is that?

11 MR. WATSON: The 20th is Wednesday.

12 THE COURT: A Wednesday? I should be here. You
13 know what. If you give me a second, I can check my calendar
14 and see if I have anything that day.

15 MR. WATSON: Certainly.

16 THE COURT: Just one second.

17 (Pause)

18 THE COURT: It looks like all I have that day is I
19 have petty offense hearings in the morning that start at
20 10:00. Those usually don't last much past 11:30. So, I'll
21 be here. And if you need me, just call.

22 MR. WATSON: Thank you. Hopefully we won't have
23 to, but we just wanted to check.

24 THE COURT: Certainly. Well, if you need me, I'll
25 be here.

1 MR. WATSON: Right.

2 THE COURT: All right. Well, I know you guys are
3 working hard and I'll see you -- you're coming I think in
4 person on the 14th. Is that right?

5 MR. WATSON: Yes, Your Honor. I will not be
6 there, Your Honor, but Phil Combs and Paul Rosenthal for
7 Ethicon will be there.

8 THE COURT: All right, great. Well, make sure --

9 MR. RICHARDS: And for the plaintiffs -- I'm
10 sorry. For the plaintiffs Renee, Bryan Aylstock, and Tom
11 Cartmell I believe will be there.

12 THE COURT: All right. Well, do me a favor and
13 have, you know, have really what you have the objections to,
14 have those portions highlighted and make sure that you can
15 put in some context for me what the testimony is about and
16 what your objection is so that I can really understand what
17 it is that the problem -- what the problem is and, and what
18 the testimony is about. And I think we can probably plow
19 through it pretty quickly.

20 MR. WATSON: Yes, Your Honor. And I'll certainly
21 relay those instructions to our team that's handling it.

22 THE COURT: Great. All right. Well, thank you.

23 MR. RICHARDS: Thank you for your time, Your
24 Honor.

25 MR. WATSON: Thank you, Your Honor.

1 THE COURT: Bye-bye.

2 (Proceedings concluded)

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8 I, Lisa A. Cook, Official Reporter of the United
9 States District Court for the Southern District of West
10 Virginia, do hereby certify that the foregoing is a true and
11 correct transcript, to the best of my ability, from the
12 record of proceedings in the above-entitled matter.

13

14

15 s\Lisa A. Cook

August 11, 2014

16 Reporter

Date

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